United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 1, 2021
Lyle W. Cayce
Clerk

No. 20-30010

O. B. Davis, Jr.,

Petitioner—Appellant,

versus

Johnny Sumlin,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:19-CV-1107

Before Higginbotham, Smith, and Oldham, *Circuit Judges*.

Andrew S. Oldham, *Circuit Judge*:

O.B. Davis Jr., Louisiana prisoner #106316, pleaded *nolo contendere* to forcible rape. He was sentenced to twenty years' imprisonment and did not appeal his conviction or sentence. Several years later, Davis received a letter from Krystal Mallet—a witness who had made inculpatory statements prior to Davis's plea. Mallett claimed Davis's victim admitted to lying about the rape. After exhausting his remedies in state court, Davis filed a petition for habeas corpus in federal court. In that petition, Davis argued his conviction was obtained using false testimony in violation of the Fourteenth Amendment. The district court denied the petition on the merits.

This is not Davis's first federal habeas petition—he has previously filed at least one other. *See Davis v. Louisiana*, 2:15-CV-02915 (W.D. La. Dec. 5, 2015). That means Davis must confront two different jurisdictional hurdles.

First, before Davis even can file his petition in the district court, he must first obtain permission from a three-judge panel of this court. *See* 28 U.S.C. § 2244(b)(3). Davis never sought or obtained that permission, so the district court had no jurisdiction to accept the second-or-successive petition—much less to consider the merits of it. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007) ("[Petitioner] neither sought nor received authorization from the Court of Appeals before filing his [second or successive] petition . . . so the District Court was without jurisdiction to entertain it."); *Montgomery v. Goodwin*, 841 F. App'x 700, 703 (5th Cir. 2021) (per curiam).

Notwithstanding this absence of jurisdiction, the district court purported to adjudicate and deny Davis's petition on the merits. That was error. In habeas proceedings, as in every other kind, federal courts must do jurisdiction first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (quotation omitted)). And where jurisdiction is lacking, federal courts also must do jurisdiction last. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Now the second jurisdictional hurdle: Even if we previously authorized a successive application under § 2244(b), Davis still could not appeal the district court's merits determination without a certificate of

appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1). A COA will not issue unless the movant has "made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Here, Davis argues his conviction was obtained using Mallett's false testimony in violation of the Fourteenth Amendment. But Mallett has since recanted her recantation. At an evidentiary hearing during state post-conviction proceedings, she admitted everything in the recantation letter was a lie, that she wrote it at the urging of a third party, and that she was under the influence of drugs at the time she wrote it. *Cf. Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir. 2003) (holding the petitioner "cannot meet [his] burden with the recanted testimony . . . given the numerous contradictory statements [the witness] has made and other evidence of [the petitioner's] guilt"). Without more, Davis has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He therefore is not entitled to a COA.

In an ordinary civil case, either of these jurisdictional defects would provide a sufficient basis to preclude Davis's appeal. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (explaining that "there is no unyielding jurisdictional hierarchy" requiring a court to consider one of two jurisdictional defects before the other). That's because, in an ordinary civil case, all dismissals are created equal—they all equally prevent the exercise of jurisdiction where there is none. But this is not an ordinary civil case. Simply denying Davis's request for a COA would preclude him from appealing to our court—but it would do nothing to vitiate the district court's jurisdictionless merits decision.

We therefore must decide this case under § 2244(b): in the absence of an authorization under that subsection, the district court lacked jurisdiction to decide the merits. The district court's judgment is therefore VACATED, and the case is REMANDED with instructions to dismiss the petition for lack of jurisdiction. The COA application is DENIED as moot.